

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

U.S. WATER SERVICES, INC.
and ROY JOHNSON,

Plaintiffs,

v.

NOVOZYMES A/S and
NOVOZYMES NORTH AMERICA, INC.,

Defendants.

ORDER
13-cv-864-jdp

The court held a conference to address the remaining motions in limine. The motions are resolved as follows.

A. U.S. Water's motions in limine

1. To exclude evidence related to *ChemTreat* litigation, Dkt. 409

This motion is denied as to evidence of trade secrets evidence that Novozymes says are related to the value of U.S. Water's phytase product, pHytOUT. The parties are reminded to minimize references to the *ChemTreat* litigation itself.

2. To exclude evidence of DuPont products as a noninfringing alternative, Dkt. 418

This motion is denied. The court will allow Novozymes to offer evidence of Spezyme RSL and Distillase SSF+ as noninfringing alternatives. The jury will be instructed that it may consider those products as relevant to the reasonable royalty only if the jury is persuaded to a preponderance of the evidence that the products are (1) noninfringing; (2) available at the time of the hypothetical negotiation; and (3) acceptable to customers in the relevant market.

B. Novozymes's motion to exclude testimony of Richard Bero, Dkt. 462

This motion is denied in full. Novozymes has raised a number of grounds that may undermine the persuasiveness of Bero's opinions, but the court concludes that Novozymes' objections go the weight of the opinions, not their admissibility.

The court will also allow Bero to testify about the opinions in his supplemental report. Finally, the court will not require Bero to exclude from his calculations evidence of infringement from the four plants that have received covenants not to sue. Because the covenants are retrospective and they do not release Novozymes from liability, under *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 500-02 (1964), they do not provide Novozymes a defense for its own infringement.

Entered October 11, 2017.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge